IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6076 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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HEIRS OF SUKHBIRSINH CHIKARA

Versus

COMMANDANT

Appearance:

1. Special Civil Application No. 6076 of 1988

MR YN OZA with MR NIRJAR DESAI for Petitioner

MR MR MENGDE, AGP for Respondents

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 05/09/2002

ORAL JUDGEMENT

The instant petition was filed by Late Shri S.G.Chhikara, under Article 226 of the Constitution, praying the Court to issue a writ of mandamus or any

other appropriate writ or direction to quash and set aside order dated May 16, 1988 issued by the respondents promoting 13 juniors to him, to the posts of Deputy Superintendent of Police. It was also prayed by him to direct the respondents to consider his case for promotion to the post of Deputy Superintendent of Police with effect from the year 1983 when his immediate juniors were promoted to the post of Deputy Superintendent of Police and confer on him deemed date of promotion with all monetary benefits. It may be stated that though prayer made by the deceased was to quash order dated May 16, 1988 by which his immediate 13 juniors were promoted to the post of Deputy Superintendent of Police, the learned counsel for the parties have agreed that the correct date of order is June 15, 1988 and not May 16, 1988 as mentioned in the petition.

2. Shri S.G.Chhikara having expired during the pendency of the petition, is now represented by his heirs and legal representatives. The facts as emerge from the record of the case may be stated briefly :

The deceased was initially recruited as Police Sub-Inspector on December 12, 1966. He was promoted to the post of Police Inspector on April 14, 1976. By an order dated September 12, 1976, he was reverted to the post of Police Sub-Inspector and, therefore, he had challenged the said order by instituting Regular Civil Suit No. 345 of 1976, in the Court of learned Civil Judge (S.D.) at Gondal. The suit filed by him was dismissed by the Trial Court and, therefore, he had preferred Regular Civil Appeal No. 96 of 1980 before the District Court, Rajkot. The learned 2nd Extra Assistant Judge, Rajkot, who had heard the appeal, had allowed the same. Feeling aggrieved by the judgment of the First Appellate Court, the State of Gujarat had preferred Second Appeal No. 74 of 1986 before the High Court, but the same was summarily dismissed on June 27, 1986. In view of the judicial decisions in favour of the deceased petitioner, the respondents passed an order dated November 21, 1986, by which he was reinstated in service as an Armed Police Inspector with effect from September 12, 1976 i.e. the date on which he was reverted to the post of Police Sub-Inspector. By order dated May 13, 1987, his seniority was fixed and in the gradation list of Armed Police Inspectors as on January 1,1986 his name was mentioned at Serial No.11-A i.e. between the names of Mr. N.K.Jhala and Mr. M.P.Gupta, who were placed at Serial No.11 and 12 respectively. However, in the year 1983, juniors to the deceased were promoted to the post of Deputy Superintendent of Police. It was his case that

his case for promotion to the post of Deputy Superintendent of Police was not considered by the respondents because the litigation instituted by him to challenge the order of reversion was pending. According to him, after disposal of Second Appeal preferred by the State Government as well as his placement at Serial No. 11-A in the gradation list of Armed Police Inspectors as on January 1, 1986, there was no reason or justification for the respondents to deny him the promotional post. Meanwhile, the Departmental Promotion Committee met on March 14, 1988 and recommended to promote certain officers which included 13 officers, who were junior to him, for the post of Deputy Superintendent of Police. The case of the deceased was that his case for promotion was never considered by the competent authority before promoting juniors to him and, therefore, the said action of the respondents was illegal, unreasonable, arbitrary, discriminatory and violative of the provisions enshrined in Articles 14 & 16 of the Constitution. What was mentioned by the deceased in the petition was that though he was communicated adverse remarks for the year 1985-86, he had made a representation dated July 5, 1986 with a request to expunge those remarks, which was not decided at all, and on the basis of adverse remarks for the year 1985-86, the respondents were not justified in denying promotion to the post of Deputy Superintendent of Police. Therefore, he instituted the instant petition in the month of June, 1988 and claimed reliefs to which reference is made earlier.

3. On service of notice, Mr. C.B.Trivedi, Under Secretary, Home Department, Gandhinagar, has filed an affidavit in opposition. In the reply affidavit, it is stated that the deceased was appointed as Company Commander in the month of December, 1966 and was redesignated as Police Sub-Inspector and was temporarily promoted as Police Inspector in the month of March, 1976. It is stated that the deceased continued to hold the post of Police Inspector till September 7, 1976, after which he was reverted to the post of Police Sub-Inspector. What is mentioned in the reply is that after the decision of the High Court in Second Appeal No. 74 of 1986, the deceased was reinstated in service as Armed Police Inspector from the date of reversion i.e. September 12, 1976 and his seniority as on January 1, 1985 was fixed between Mr. N.K.Jhala and Mr. M.P.Gupta, who were placed at serial Nos. 11 & 12 respectively in the gradation list. What is claimed is that the case of the deceased was required to be considered as on the date on which the case of Mr. M.P.Gupta was considered by the Departmental Promotion Committee and the said Committee,

which had met on March 14, 1988, had considered his case with effect from August 3, 1983, but in view of the Annual Confidential Report of the deceased, it was found by the Committee that the deceased was not fit to be promoted to the post of Deputy Superintendent of Police, because the criteria for promotion is proved merit and efficiency. Further, in the reply it is stated that on perusal of the Annual Confidential Report of the deceased, it was found by the Committee that there were adverse remarks against the deceased for the year 1985-86 and after making overall assessment of service record of the deceased, the Committee had decided not to recommend to the competent authority to grant promotion to the deceased. Thus, by filing the affidavit-in-reply, the respondents have justified their action of not promoting the deceased to the post of Deputy Superintendent of Police, and prayed the Court to dismiss the petition.

4. Smt. Jyotiben S. Chhikara, who is wife of deceased S.Chhikara, has filed affidavit-in-rejoinder mentioning, inter-alia, that as no adverse remarks were recorded against her husband for the last five years prior to 1983, he should have been promoted to the post of Deputy Superintendent of Police with effect from March 3, 1983 and granted consequential benefits.

5. I have heard the learned counsel for the parties. The relief claimed by the deceased to set aside and quash order dated June 15, 1988 by which his immediate 13 juniors were promoted to the posts of Deputy Superintendent of Police, cannot be granted because a copy of the said order is not produced on the record of the case. What is not on the record of the case, can never be quashed or set aside, and therefore, the prayer to quash an order, which is not produced on the record of the case, cannot be considered by the Court. Moreover, 13 junior officers are not impleaded as respondents in the petition. Without impleading them and serving them or giving opportunity to defend their promotion, the prayer to set aside their promotions, can never be granted. Under the circumstances, the prayer made by the deceased to set aside and quash order dated June 15, 1988 by which 13 juniors to him were promoted to the post of Deputy Superintendent of Police, is liable to be refused and is hereby refused.

6. The claim that till the decision on the representation made by the deceased against the adverse remarks recorded for the year 1985-86, the Departmental Promotion Committee was not entitled to take into consideration the same for the purpose of denying

promotion to the deceased and, therefore, the relief of deemed date of promotion to him with consequential benefits should be granted,is devoid of merits. The law on the subject of consideration or otherwise, of the adverse remarks by the Departmental Promotion Committee for denying promotion to an employee, is firmly stated by the Five-Judge Constitution Bench of the Supreme Court in PRAKASH CHAND SHARMA v. THE OIL AND NATURAL GAS COMMISSION, 1970 SERVICE LAW REPORTER, 116. In that case, the petitioner, who was appointed as Junior Transportation Inspector, had challenged his supersession which took place in June, 1963. In the affidavit-in-reply, it was pointed out that on account of unfavourable remarks in his confidential reports, the petitioner was found not suitable for promotion. It was found by the Supreme Court that the instructions as to the confidential reports were not observed properly in the case. Further, it was also noticed that the Rules governing service conditions enabled an employee to make representation against adverse remarks. However, while negativing the claim of the petitioner for promotion, the Supreme Court has made following pertinent observations in Paragraph 9 of the reported decision :

> "It was not disputed that the instructions as to confidential reports have not been properly observed in this case. It is not suggested that the departmental promotion Committee acted mala fide. If the adverse remarks were there in the confidential reports, it was the duty of the departmental promotion Committee to take note of them and come to a decision on a consideration of them. The Committee could not be expected to make investigation about the confidential reports. It appears to us that in this case there was no discrimination, purposeful or otherwise, and at the best, the Committee's taking into consideration confidential reports with respect to which the petitioner had been given no chance to make a representation was merely fortuitous. In such a state of affairs, we are not satisfied that any interference is called for and the rule will, therefore, be discharged. There will be no order as to costs."

7. From the clear proposition of law enunciated by the Supreme Court in the above-quoted decision, it becomes manifest that the decision of the Departmental Promotion Committee is not liable to be set aside, unless it is found to be mala fide. What is ruled by the Supreme Court is that if the adverse remarks are there in

the confidential reports, the Departmental Promotion Committee is bound to take note of them and it is not the duty of such a Committee to make investigation about the confidential reports and there is no discrimination if the Committee takes into consideration confidential reports with respect to which an employee has not been given chance to make representation, because as explained by the Supreme Court, denying the chance to make a representation is merely fortuitous.

8. Which course should be adopted by the competent authority in case when promotion is denied to an employee on the basis of adverse remarks against which a representation is made, is indicated by the Five-Judge Constitution Bench decision of the Supreme Court in R.L.BUTAIL v. UNION OF INDIA AND OTHERS, 1970 SERVICE LAW REPORTER, 926. In paragraph 15 of the said reported decision, the Supreme Court has held as under :-

> "The confidential report for 1965 was prepared in 1966. Therefore, the report for 1965 would not be before that Committee when it declined to recommend the appellant in 1965. This time, the report for 1964 would be before it and that too without his representation against it as that report had been conveyed to the appellant in September 1965. That fact, however, cannot make any difference. The representation made by the appellant, though made subsequently, was actually rejected with the result that the confidential report for 1964 remained unchanged. The practice followed by the Promotion Committee was that if in such a case a representation was to be accepted and in consequence the confidential report was altered or expunged, the Promotion Committee would have to review its recommendations in the light of such a result. In the present case, however, no question of such a review arose as reports for 1964 and 1965 were, in spite of representations by the appellant, neither altered nor set aside. There was, therefore, no question of any injustice having been done to the appellant despite the fact that the Committee had before it the confidential report without there being along with it any representation made by the appellant. Nor did the question of a breach of natural Justice arise in view of the aforesaid practice followed by the Promotion Committee."

9. From the above-quoted pertinent observations made

by the Supreme Court, it is evident that if ultimately the representation made by the deceased is accepted, the Departmental Promotion Committee will have to review its recommendations in the light of such a result. However, it may not be necessary for the Departmental Promotion Committee to adopt the course suggested by the Supreme Court in the above-quoted decision, because here the criteria for promotion from the post of Police Inspector to the post of Deputy Superintendent of Police is of proved merit and efficiency. Even Smt. Jyotiben, wife of deceased S.Chhikara, has admitted in her rejoinder affidavit that the case of her husband was considered by the Departmental Promotion Committee for promotion to the post of Deputy Superintendent of Police. As explained in the affidavit-in-reply of Mr. C.B.Trivedi, Under Secretary, Home Department, Sachivalaya, Gandhinagar, Departmental Promotion Committee had found that the deceased was not fulfilling the criteria of proved merit and efficiency for claiming promotion to the post of Deputy Superintendent of Police. It is well settled principle of law that an employee has no right to claim promotion, but the only right conferred on him by the law is that his case for promotion must be considered by the competent authority. The case of the deceased for promotion to the post of Deputy Superintendent of Police was considered by the Departmental Promotion Committee. Neither the deceased nor the wife of the deceased has alleged malafides against the members of the Departmental Promotion Committee and, therefore, the bonafide decision rendered by the Committee cannot be interfered with in the present petition. In a petition filed under Article 226 of the Constitution, the Court does not act as an appellate Court over the decisions rendered by the departmental authorities. The power of judicial review is limited to see whether the decision making process is vitiated or not, and not the decision itself. There is nothing on the record of the case to show that the decision of the Departmental Promotion Committee, not to recommend the name of the deceased for promotion to the post of Deputy Superintendent of Police, is either arbitrary or illegal, and is not vitiated in any manner.

Having regard to the totality of the facts and circumstances of the case, I am of the view that the petition has no substance and is liable to be dismissed.

For the foregoing reasons, the petition fails and is dismissed. Rule is discharged, with no order as to costs.

(J.M.Panchal,J.)

(patel)